JUDGE MARRERO 15 CV 03309

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE I.V. MEDICAL DOCTOR, P.C., Plaintiff, v. MARINA DEDIVANOVIC, doing business as THE IV NURSE, Defendant.	Civil Action No. ____________ **COMPLAINT**

Plaintiff, The I.V. Medical Doctor, P.C., by its attorneys, Fross Zelnick Lehrman & Zissu, P.C., for its Complaint against Defendant, Marina Dedivanovic, alleges the following:

NATURE OF THE ACTION

1. Plaintiff provides in-home intravenous hydration therapy under the well-known service mark THE I.V. DOC. Plaintiff uses the following logo

THE I.V. DOC

and operates the website www.theivdoc.com. This action arises out of Defendant's infringement of Plaintiff's mark and logo by using a confusingly similar mark, THE IV NURSE, a confusingly similar logo

IV NURSE

and a confusingly similar website domain name, www.theivnurse.com, for services similar to, and competitive with, Plaintiff's services.

2. Not only is such conduct damaging Plaintiff and causing immediate and irreparable harm to Plaintiff, but also it is deceiving the public. Accordingly, Plaintiff asserts claims for service mark infringement and unfair competition under Section 43(a) of the Trademark Act, 15 U.S.C. § 1125(a); and substantial and related claims under New York statutory and common law. Plaintiff seeks injunctive relief to prevent further use of Defendants' mark, logo, and domain name, as well as monetary relief in the form of Defendant's profits, Plaintiff's damages, attorneys' fees, interest, and such other relief as the Court deems just and proper.

PARTIES

3. Plaintiff is a corporation organized and existing under the laws of New York, with a principal place of business at 53 West 36th Street, Suite 204, New York, NY 10018.

4. On information and belief, defendant is citizen and domiciliary of the State of New York, whose address is 1320 York Avenue, New York, New York 10021.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to Section 39 of the Trademark Act of 1946 (the "Lanham Act"), 15 U.S.C. § 1121, and under Sections 1331, 1338(a) and 1338(b) of the Judicial Code, 28 U.S.C. §§ 1331, 1338(a) and 1338(b). The Court has supplemental jurisdiction over the state law claims under Section 1367(a) of the Judicial Code, 28 U.S.C. § 1367(a).

6. This Court has personal jurisdiction over Defendant because Defendant is a domiciliary of this state and is engaged in infringing activities in this State.

7. Venue is proper in this district pursuant to Section 1391(b) of the Judicial Code, 28 U.S.C. § 1391(b), because Defendant is subject to personal jurisdiction in this district.

FACTS COMMON TO ALL CLAIMS FOR RELIEF

A. Plaintiff's Business and THE I.V. DOC Mark.

8. Plaintiff provides mobile intravenous hydration therapy services under the service mark THE I.V. DOC (the "Mark") to clients in various metropolitan areas in the United States, such as New York City, Long Island (The Hamptons), Los Angeles, Chicago, and San Francisco. Plaintiff has invested substantial economic and human resources into developing, advertising, promoting and expanding its brand and services both in the New York City metropolitan area and nationally.

9. Plaintiff's services provides quick relief from dehydration caused by hangover, flu, jet lag, exercise fatigue, general exhaustion, food poisoning, and much more. Plaintiff's services are offered by its team of licensed medical professionals, who treat patients in the comfort and privacy of their own home.

10. Plaintiff has received widespread media attention on television, including ABC's "Good Morning America," NBC's "Today Show", CBS News and Fox News, and in print and online publications, such as The New York Times, The New York Post's "Page Six," New York Daily News, the Daily Beast, and LA Weekly, as well as significant word of mouth.

11. In connection with its business, Plaintiff has adopted a logo incorporating an intravenous drip bag with the name THE IV DOC, shown above in Paragraph 1 (the "Logo").

12. Plaintiff maintains an informational and interactive website under the domain name www.theivdoc.com (the "Domain Name") where clients can learn about the range of

thirty-minute intravenous hydration therapy services offered by Plaintiff, and can schedule appointments.

13. As a result of Plaintiff's efforts and the tremendous success of Plaintiff's services, Plaintiff's Mark, Logo, and Domain Name have come to identify Plaintiff's services exclusively and uniquely in its field, have become well-known marks of Plaintiff, and represent enormous goodwill of Plaintiff. Not only have Plaintiff's Mark, Logo, and Domain Name achieved recognition and significance in the mind of consumers, but also patients and potential patients have come to rely on Plaintiff's Mark, Logo, and Domain Name as indicating services that are of the highest quality and that derive exclusively from Plaintiff.

14. Thus, Plaintiff has acquired strong common law rights in its Mark, Logo, and Domain Name.

15. Plaintiff's Mark, Logo, and Domain Name are vital to Plaintiff and represent not only Plaintiff's services offered under the marks, but also the strongly positive reputation of Plaintiff's business. Plaintiff will suffer irreparable harm if any third parties, including Defendant, are allowed to trade on Plaintiff's reputation and goodwill by providing services under any mark or logo that is confusingly similar to Plaintiff's Mark, Logo, and Domain Name.

B. Defendant's Infringing Conduct

16. Recently, Defendant began using the service mark THE IV NURSE for services similar to, and competitive with, Plaintiff's services. In addition, Defendant adopted the logo shown in Paragraph 1, above, along with the domain name www.theivnurse.com. (Defendant's mark, logo and domain name are referred to herein "Defendant's Marks.")

17. On January 6, 2015, Defendant filed U.S. trademark Application Serial No. 86/496,777 (the "Application") with the United States Patent and Trademark Office to register

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IV NURSE for "Providing mobile intravenous hydration services" based on an intent to use the mark.

18. Defendant's Marks are confusingly similar to Plaintiff's Mark, Logo, and Domain Name. Defendant's Marks are highly similar to Plaintiff's Mark, Logo, and Domain Name in sight, sound, meaning, and commercial impression. THE I.V. DOC and THE IV NURSE are both three words long, both begin with THE I.V. (or IV), and DOC and NURSE have similar connotations. The parties' logos both feature an intravenous drip bag, half-full, with a tube extending from the bottom. Patients and potential patients could easily believe, mistakenly, that Plaintiff's business and Defendant's business are one and the same, or that Defendant is an affiliate of Plaintiff, or that Plaintiff licenses, endorses or approves Defendant's business or services, or that Plaintiff and Defendant are otherwise connected or associated.

19. Defendant's advertisement, promotion and rendering of her services under Defendant's Marks are directed to the same audience as Plaintiff's services under its Mark, Logo, and Domain Name, including but not limited to patients and potential patients who have come to rely on the Plaintiff's Mark, Logo, and Domain Name as designating exclusively Plaintiff's services. Defendant has directed advertisement, promotion and rendering of Defendant's services offered under Defendant's Marks to patients, potential patients, and others located in New York generally and in this judicial district specifically.

20. Even the most careful person is likely to be confused by Defendant's use of Defendant's Marks, since they are highly similar to Plaintiff's, especially given that they are used for virtually identical and directly competitive services.

21. Defendant is not associated or affiliated with Plaintiff and has never been authorized or otherwise licensed by Plaintiff to use Plaintiff's Mark, Logo, and Domain Name, or any names or marks confusingly similar thereto, in connection with any business or services.

22. On information and belief, Defendant selected and has used Defendant's Marks with actual and constructive knowledge of Plaintiff's ownership of and exclusive rights to use Plaintiff's Mark, Logo, and Domain Name, and with the intent to trade off the significant goodwill symbolized by, and the strong industry recognition of, Plaintiff's Mark, Logo, and Domain Name.

23. On information and belief, Defendant commenced use of Defendant's Marks and filed the Application long after Plaintiff commenced use of Plaintiff's Mark, Logo, and Domain Name, and long after Plaintiff developed substantial goodwill in Plaintiff's Mark, Logo, and Domain Name. As a result, Plaintiff has priority.

24. On information and belief, at all relevant times and in furtherance of her infringing activities, Defendant has willfully and intentionally used and continues to use Defendant's Marks in connection with Defendant's services, which are closely related if not identical to the services rendered by Plaintiff.

25. On information and belief, Defendant's conduct is intended to cause confusion, and is intentionally fraudulent, malicious, willful and wanton.

C. Harm Caused by Defendant's Infringing Conduct

26. On information and belief, in adopting Defendant's Marks for Defendant's services, Defendant sought to benefit from the recognition and goodwill of the Plaintiff's Mark, Logo, and Domain Name. Defendant's conduct appears to be calculated to confuse and mislead

consumers, to divert business from Plaintiff and otherwise to misappropriate the goodwill of Plaintiff's Mark, Logo, and Domain Name.

27. As a result of Defendant's use of Defendant's Marks in connection with intravenous hydration therapy services, the consuming public is likely to be confused, deceived and misled into believing that goods and services offered under Defendant's Marks are rendered, licensed, authorized, endorsed or sponsored by Plaintiff, or that the parties are affiliated, associated, or connected.

28. Further, the goodwill that Plaintiff has built up in Plaintiff's Mark, Logo, and Domain Name is put at risk by Defendant's appropriation and use of Defendant's Marks in connection with her services. Defendant's unauthorized acts unfairly and unlawfully wrest from Plaintiff control over its Mark, Logo, and Domain Name and reputation, particularly as Plaintiff has no control over the quality of Defendant's services. As a result, Plaintiff's extremely valuable reputation is being irreparably damaged. If Defendant's conduct is not enjoined, it will continue to injure the value of Plaintiff's Mark, Logo, and Domain Name and the ability of those marks to indicate services emanating from a single source, namely, Plaintiff.

29. Defendant's infringing activities have caused and will continue to cause irreparable harm to the business and goodwill of Plaintiff unless permanently restrained by this Court.

30. Plaintiff has no adequate remedy at law.

FIRST CLAIM FOR RELIEF:
TRADE NAME INFRINGEMENT (15 U.S.C. § 1125(a))

31. Plaintiff's rights in THE I.V. DOC trade name developed long prior to any use of Defendant's Marks by Defendant.

32. Defendant's Marks are each confusingly similar to Plaintiff's THE I.V. DOC trade name.

33. The services offered and rendered under Defendant's Marks are identical or closely related to the services offered and rendered under Plaintiff's THE I.V. DOC trade name.

34. Defendant's conduct is likely to cause confusion or to cause mistake or to deceive patients, potential patients, the public, and the media as to the affiliation, connection or association between Plaintiff and Defendant, or as to the origin, sponsorship or approval of Defendant's services.

35. Defendant's unauthorized use of Defendant's Marks falsely and misleadingly represents Defendant as being legitimately connected with or authorized by Plaintiff, and places beyond Plaintiff's control its own reputation and goodwill.

36. On information and belief, Defendant's conduct is willful, deliberate and in bad faith, and undertaken with full knowledge that Defendant has no right, license or authority to use any mark confusingly similar to Plaintiff's THE I.V. DOC trade name.

37. As a result of the foregoing, Defendant has falsely designated the origin of her services offered under Defendant's Marks and has engaged in trade name infringement, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

38. Defendant's aforesaid conduct has caused and is causing irreparable injury to Plaintiff, and, unless enjoined by this Court, will continue both to damage Plaintiff and to deceive the public. Plaintiff has no adequate remedy at law.

SECOND CLAIM FOR RELIEF:
UNFAIR COMPETITION (15 U.S.C. § 1125(a))

39. Plaintiff's first use pre-dates Defendant's first use by nearly a full year. Plaintiff's rights in Plaintiff's Mark, Logo, and Domain Name developed long prior to any use of Defendant's Marks by Defendant.

40. Defendant's Marks are each confusingly similar to each of Plaintiff's Mark, Logo, and Domain Name.

41. The services offered and rendered under Defendant's Marks are identical or closely related to the services offered and rendered under Plaintiff's Mark, Logo, and Domain Name.

42. Defendant's conduct is likely to cause confusion or to cause mistake or to deceive patients, potential patients, the public, and the media as to the affiliation, connection or association between Defendant and Plaintiff, or as to the origin, sponsorship or approval of Defendant's services.

43. Defendant's unauthorized use of Defendant's Marks falsely and misleadingly represents Defendant as being legitimately connected with or authorized by Plaintiff, and places beyond Plaintiff's control its own reputation and goodwill.

44. On information and belief, Defendant's conduct is willful, deliberate and in bad faith, and undertaken with full knowledge that Defendant has no right, license or authority to use any mark confusingly similar to Plaintiff's Mark, Logo, and Domain Name.

45. As a result of the foregoing, Defendant has falsely designated the origin of her services offered under Defendant's Marks and has engaged in unfair competition, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

46. Defendant's aforesaid conduct has caused and is causing irreparable injury to Plaintiff, and, unless enjoined by this Court, will continue both to damage Plaintiff and to deceive the public. Plaintiff has no adequate remedy at law.

THIRD CLAIM FOR RELIEF:
COMMON LAW TRADEMARK INFRINGEMENT

47. Defendant's aforesaid conduct constitutes trademark infringement under the common law of the State of New York.

48. On information and belief, Defendant's conduct is willful, deliberate and in bad faith.

49. Defendant's aforesaid conduct has caused and is causing irreparable injury to Plaintiff, and, unless enjoined by this Court, will continue both to damage Plaintiff and to deceive the public. Plaintiff has no adequate remedy at law.

FOURTH CLAIM FOR RELIEF:
COMMON LAW UNFAIR COMPETITION

50. Defendant's aforesaid conduct constitutes unfair competition under the common law of the State of New York.

51. On information and belief, Defendant's conduct is willful, deliberate and in bad faith.

52. Defendant's aforesaid conduct has caused and is causing irreparable injury to Plaintiff, and, unless enjoined by this Court, will continue both to damage Plaintiff and to deceive the public. Plaintiff has no adequate remedy at law.

FIFTH CLAIM FOR RELIEF:
DECEPTIVE TRADE PRACTICES IN VIOLATION OF N.Y. GEN. BUS. LAW § 349

53. By adopting and using Defendant's Marks, which are colorable imitations of Plaintiff's Mark, Logo, and Domain Name, Defendant has engaged in activities that deceive or have a tendency to deceive a material segment of the public to which Defendant has directed her marketing activities.

54. On information and belief, through such deceptive acts, Defendant has engaged in consumer-oriented conduct that has affected the public interest of New York and has resulted in injury to consumers and harm to the public in the State of New York.

55. On information and belief, Defendant's conduct is willful and in knowing disregard of Plaintiff's rights.

56. By virtue of the foregoing, Defendant has engaged in deceptive acts or practices in the conduct of her business, in violation of Section 349 of the General Business Law of the State of New York.

57. Defendant's aforesaid conduct has caused and is causing irreparable injury to Plaintiff, and, unless enjoined by this Court, will continue both to damage Plaintiff and to deceive the public. Plaintiff has no adequate remedy at law.

SIXTH CLAIM FOR RELIEF:
DILUTION IN VIOLATION OF N.Y. GEN. BUS. LAW § 360-*l*

58. Plaintiff's Mark, Logo, and Domain Name are highly distinctive of Plaintiff's services in the United States and in the State of New York. As a result of Plaintiff's extensive use and promotion of Plaintiff's Mark, Logo, and Domain Name, the services it renders thereunder, and the success of Plaintiff's services offered thereunder, Plaintiff's Mark, Logo, and

Domain Name are widely recognized among the consuming public as singular designations of source of Plaintiff's services.

59. Defendant's use of Defendant's Marks, which are highly similar or virtually identical to Plaintiff's Mark, Logo, and Domain Name, is diluting and is likely to continue diluting Plaintiff's Mark, Logo, and Domain Name by blurring the distinctiveness thereof and by tarnishing Plaintiff's Mark, Logo, and Domain Name, all in violation of Section 360-l of the General Business Law of the State of New York.

60. On information and belief, Defendant's conduct is willful, deliberate and in bad faith.

61. Defendant's aforesaid conduct has caused and is causing irreparable injury to Plaintiff, and, unless enjoined by this Court, will continue both to damage Plaintiff and to deceive the public. Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff respectfully demands judgment as follows:

1) Entering judgment for Plaintiff on each of its claims.

2) Directing that Defendant, her partners, officers, agents, privies, shareholders, principals, directors, licensees, attorneys, servants, employees, affiliates, subsidiaries, successors and assigns, and all persons acting in concert or in participation with any of them, be preliminarily and permanently enjoined from:

a. Using Defendant's Marks, or any other name or mark that is confusingly similar to, or a derivation or colorable imitation of any of Plaintiff's Mark, Logo, and Domain Name (collectively, "Prohibited Marks"), in connection with mobile intravenous hydration services, or any similar or related services;

b. making or employing any other commercial use of any of the Prohibited Marks;

c. using any other false designation of origin or false description or representation or any other thing calculated or likely to cause confusion or mistake in the mind of the public or the media or to deceive the public or the media into believing that Defendant's services or activities are in any way sponsored, licensed, endorsed, or authorized by, or affiliated, associated or connected with, Plaintiff, or originate from Plaintiff;

d. doing any other acts or things calculated or likely to cause confusion or mistake in the mind of the public or to lead the public or investors into the belief that the services promoted, offered, or rendered by Defendant emanate from or originate with Plaintiff, or are somehow sponsored, licensed, endorsed, or authorized by, or affiliated, associated or connected with, Plaintiff, or originate from Plaintiff;

e. engaging in any other activity constituting unfair competition with Plaintiff or constituting an infringement of Plaintiff's Mark, Logo, and Domain Name or otherwise damaging Plaintiff's goodwill in Plaintiff's Mark, Logo, and Domain Name;

f. engaging in any activity that dilutes, blurs or tarnishes, or is likely to dilute, blur or tarnish, Plaintiff's Mark, Logo, and Domain Name;

g. using or registering any of the Prohibited Marks as part of any domain name, uniform resource locator, internet address, or social media account name or handle, including, but not limited to the domain name www.theivnurse.com;

h. using any of the Prohibited Marks as a keyword in connection with any sponsored advertising on the Internet or using any of the Prohibited Marks in any source code or otherwise using the Prohibited Marks such that a search for Plaintiff on the Internet will cause any domain name or website of Defendant to appear in search results; and

i. assisting, aiding, or abetting any other person or business entity in engaging in or performing any of the activities referred to in the above subparagraphs (a) through (h), or effecting any assignments or transfers, forming new entities or associations or utilizing any other device for the purpose of circumventing or otherwise avoiding the prohibitions set forth in subparagraphs (a) through (h).

3) Directing that Defendant voluntarily abandon the Application.

4) Directing that Defendant transfer or cause to be transferred to Plaintiff the domain name and www.theivnurse.com, and any other domain names owned by Defendant that incorporate any of the Prohibited Marks, and execute all necessary documents to effectuate such transfer(s).

5) Directing that Defendant deliver up to Plaintiff for destruction, without any compensation to Defendant, all labels, tags, signs, stationery, prints, packages, promotional and marketing materials, advertisements and other materials currently in her possession or under her control incorporating, featuring or bearing any Prohibited Marks.

6) Directing that Defendant, at her own expense, delete Defendant's Marks from any and all websites, blogs, and social media, including but not limited to Facebook, Twitter and Instagram, and recall from any third parties any materials that violate Plaintiff's rights in Plaintiff's Mark, Logo, and Domain Name, and that Defendant deliver up to Plaintiff for destruction all such materials returned to her.

7) Directing such other relief as the Court may deem appropriate to prevent the public from deriving the erroneous impression that any service rendered or promoted by Defendant is authorized by Plaintiff or related in any way to Plaintiff or Plaintiff's business, or that Defendant is otherwise affiliated with Plaintiff.

8) Directing Defendant to file with the Court and serve on counsel for Plaintiff within thirty (30) days after entry of judgment, a sworn written statement setting forth in detail the manner and form in which Defendant has complied with paragraphs 2 through 7 above.

9) Directing Defendant to account for and pay to Plaintiff her profits, gains, property and advantages attributable to the unlawful conduct.

10) Awarding Plaintiff such damages that it has sustained or will sustain by reason of Defendant's unlawful conduct.

11) Pursuant to 15 U.S.C. § 1117(a), awarding Plaintiff an amount up to three times the amount of actual damages sustained as a result of Defendant's violations of the Lanham Act.

12) Awarding Plaintiff the costs of this action including reasonable attorneys' fees pursuant 15 U.S.C. § 1117 and applicable state law.

13) Awarding Plaintiff interest, including pre-judgment interest, on the foregoing sums.

14) Awarding Plaintiff such other and further relief as the Court deems just and proper.

Dated: New York, New York
April 28, 2015

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

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